

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 120
5466557

BETWEEN JASON NATHAN
Applicant

AND TRANSFIELD SERVICES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Johanne Greally, Counsel for Applicant
Richard Upton, Counsel for Respondent

Investigation Meeting: 1 and 2 December 2015 at Wellington

Determination: 11 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jason Nathan has brought a claim for unjustifiable dismissal against his former employer, Transfield Services (New Zealand) Limited (Transfield). Mr Nathan had been a linesman for the respondent for approximately ten years until his dismissal. His statement of problem requested the following remedies:

"3. I would like the problem to be resolved in the following way:

- 3.1 Reinstatement;*
- 3.2 Reimbursement of lost wages between the date of his dismissal and his eventual reinstatement;*
- 3.3 Reimbursement of the difference between what I was paid on suspension and my normal pay. I received about \$600 less than I was normally receiving;*
- 3.4 Compensation for loss of retirement funds; and*

3.5 *By an award of compensation in the sum of \$15,000 for distress."*

[2] In the course of the second day of the investigation, when 3 of the scheduled 11 witnesses had completed giving their evidence, Transfield made an offer to meet all of the remedies sought in Mr Nathan's statement of problem. The offer was made publically and on the record as follows:

- a. Transfield would reinstate Mr Nathan to a position no less advantageous to him than his former position. The reinstatement would take effect from 1 February 2016. Training would be provided to bring him up to speed.
- b. He would be reimbursed lost wages from his dismissal until reinstatement.
- c. He would be reimbursed the difference between what he was paid during the period of his suspension and what he claimed he should have been paid during that period. Transfield noted it did not agree with Mr Nathan's methodology but was prepared to reimburse this sum in order to resolve the matter.
- d. Transfield would compensate Mr Nathan for the loss of retirement funds by paying the employer's contribution to his superannuation fund for the period from his dismissal to his reinstatement.
- e. Mr Nathan would receive compensation of \$15,000 for distress as sought.

[3] Mr Nathan, through counsel, stated he was unwilling to accept those remedies unless Transfield met some further conditions. The first condition was that his reinstatement would be to the particular position and base location he had been in before his dismissal. Transfield, in offering reinstatement to a position no less advantageous, had indicated Mr Nathan would be working from one of its bases in the Wellington or Lower Hutt area.

[4] The other condition imposed by Mr Nathan was the payment of interest on the retirement compensation. Interest had not been sought when the statement of problem was filed, or at any time between then and the Authority's investigation.

[5] I note that at this time counsel for Mr Nathan also made an oral application for an award of costs to be added to the remedies sought in the statement of problem. I considered and declined that application. I declined it firstly on the basis that there had been ample time since Mr Nathan had commenced proceedings for him to file an amended statement of problem which included that remedy. My second reason was that Transfield would be unfairly prejudiced by the addition of a costs remedy part way through an investigation meeting, after it had made its preparations on the basis of the remedies specified in the documentation served upon it.

[6] At this point I had to consider whether Transfield's offer effectively resolved the employment relationship problem Mr Nathan had brought to the Authority. Also whether the additional conditions belatedly sought by Mr Nathan had relevance to that issue.

Reinstatement

[7] I note that Mr Nathan had not stipulated when filing proceedings that reinstatement was to be to the exact linesman position he had occupied before his dismissal. That may have been his hope, but he could not have had a firm expectation that would occur. Reinstatement is a discretionary remedy available to the Authority where it determines an employee has a personal grievance.¹ The Authority may provide for reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.

[8] On the first day of the investigation meeting I heard evidence from two witnesses from an external organisation, which is not a party to the proceedings. The organisation contracts Transfield to undertake maintenance and repairs on its network. Mr Nathan's former position involved working on that network. The witnesses were respectively a senior manager and the Chief Executive Officer of the organisation. Each gave compelling evidence that, for reasons related to the organisation's health and safety obligations, Mr Nathan would not be permitted to work on its network again. The witnesses remained adamant in that stance through rigorous questioning and cross examination.

[9] In light of the position taken by those two witnesses, I am satisfied no useful purpose would be served by reinstating Mr Nathan to his former position. He could

¹ Section 123 (1) of the Employment Relations Act 2000 (the Act).

not undertake the work he formerly performed because of the prohibition placed on him by the external party. Although I had not heard all the evidence in this matter, it was already clear to me that, if I were to find Mr Nathan had been unjustifiably dismissed, and if I were to exercise my discretion in favour of reinstatement, I would not have reinstated him to his former position, but to one no less advantageous to him.

[10] I consider Transfield's offer of reinstatement to a position no less advantageous to Mr Nathan meets the remedy sought by him in his statement of problem. Additionally, it accords with the remedy I am likely to have awarded if I had determined he had a personal grievance and if I had further determined the remedy of reinstatement to be reasonable and practicable.²

Compensation regarding retirement funds

[11] I also consider Transfield's offer of compensation for loss of retirement funds meets the remedy sought in Mr Nathan's statement of problem. It is the remedy I am likely to have awarded if I had determined that Mr Nathan had a personal grievance. As interest had not originally been sought I would not have chosen to exercise my discretion to award it.

Conclusion

[12] Mr Nathan lodged a statement of problem setting out his employment relationship problem. He provided a list of remedies which would resolve that problem for him. Transfield has agreed to meet the remedies sought by Mr Nathan. I find the provision of those remedies will resolve the problem Mr Nathan brought to the Authority.

[13] I find the most sensible course of action is to adopt those remedies as orders of this Authority. In doing so, I note I have made no findings over the justifiability, or unjustifiability, of Mr Nathan's employment. I make these orders on the basis that once a respondent has expressed willingness to meet all the remedies sought by an applicant to resolve the employment relationship problem, that problem ceases to exist and does not require further investigation by the Authority.

² In accordance with s. 125 of the Act.

Determination

[14] Transfield Services (New Zealand) Limited is ordered to:

- (a) Reinstatement Mr Nathan to a position no less advantageous to him than that he occupied prior to his dismissal, with effect from 1 February 2016;
- (b) Reimburse Mr Nathan lost wages between the date of his dismissal and the date of his reinstatement;
- (c) Reimburse the difference between the remuneration he was paid while suspended from his employment and his normal pay;
- (d) Reimburse Mr Nathan the employer's contribution to his superannuation fund for the period from his dismissal to his reinstatement; and
- (e) Pay Mr Nathan the sum of \$15,000 compensation under s.123(1)(c)(i) of the Act.

Costs

[15] I decline to make an award of costs for the reasons given at paragraph 5 above.

Trish MacKinnon
Member of the Employment Relations Authority